





In the Supreme Court of the United States.

OCTOBER TERM, 1918.

RUSSELL MOTOR CAR COMPANY, APPELLANT
v.
THE UNITED STATES, RESPONDENT. } No. 485.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This proceeding was started in the Court of Claims by the filing of a petition on September 14, 1920. The amended petition under which the evidence was taken and under which the case was tried and decided was filed in the Court of Claims on November 20, 1920, to recover from the United States \$1,077,637.80, as a balance due from the United States for goods sold, work done and damages, growing out of the refusal of the United States to carry out a written contract, dated May 14, 1918, which had been entered into in its behalf by the then Acting Secretary of the Navy for the manufacture of antiaircraft gun mounts and sights for ships of the Navy by the appellant herein at a price of \$7,860 each.

The written contract upon which the action was based contains no clause authorizing its cancellation

on the part of either party. The appellant contended and still contends that the measure of damages should be based upon the rule of law heretofore laid down by this court as for a breach of the contract.

The Government contends that the act of Congress of June 15, 1917 (40 Stat. 182), became the cancellation clause of the contract and that the decision of the Court of Claims is sound and conclusive, based upon the "Findings of fact" (pp. 119-131).

The contract involved in this case, Dept. No. 1498 (p. 13), was made and concluded the 14th day of May, A. D. 1918, and the mounts and sights provided for in said contract were intended for use on and were a part of the equipment of vessels of the Navy (p. 120).

The Court of Claims on the facts found concludes as a matter of law that the plaintiff is entitled to recover \$161,614.58, as set out in finding 14 (pp. 129 and 130), and that it is not entitled to recover as otherwise claimed. Judgment is directed for said sum of \$161,614.58 (p. 131).

We will refer to the plaintiff-appellant as claimant, and to the United States, the respondent, as defendant in this brief.

ARGUMENT.

The claimant in its brief herein has set forth ten specifications of error, all of which said specifications are answerable by the theory set forth below, based upon the rule of law, that contracts with the United States are so made with reference to the established law of the land, and should be so understood and

construed unless otherwise clearly indicated by the terms of the agreement.

Wilson v. Rousseau, 4 How. 646, 685.

The West River Bridge Co. v. Dix, 6 How. 507, 532.

United States v. Boisdore, 11 How. 63, 88.

Rees v. Watertown, 19 Wall. 107, 121.

Ogden v. Saunders, 12 Wheat. 213, 297.

Under date of March 4, 1917, the President approved an act of Congress making appropriations for the naval service for the fiscal year ending June 30, 1918, and for other purposes (39 Stat. 1168). This act contains under the heading Naval Emergency Fund (39 Stat. 1192) the following (the language to which particular attention will be invited is italicized by us) :

To enable the President to secure the more economical and expeditious delivery of materials, equipment and munitions and secure the more expeditious construction of ships authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers and such other naval small craft, including aircraft, guns and ammunition for all of said vessels and aircraft and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, \$115,000,000, or so much thereof as may be necessary, and to be immediately available.

(a) That the word "person" as used in paragraphs (b), (c), next hereafter shall in-

clude any individual, trustee, firm, association, company, or corporation * * *. The words "*war material*" shall include arms, armament, ammunition, stores, supplies, and equipment for ships * * *.

(b) That *in time of war, or of national emergency* * * * the President is hereby authorized and empowered * * *.

Second. Within the limit of the amount appropriated therefor, to *modify or cancel any existing contract* for the building, production, or purchase of ships or war material; * * *

That all authority granted to the President in this paragraph, *to be exercised in time of national emergency, shall cease on March 1, 1918.*

(d) That whenever the United States shall cancel or modify any contract, * * * in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, * * *.

This was one of a series of acts giving to the President the power absolutely to control *all* contracts in the United States relating to foods, fuels, supplies, ships, equipment, and war material for the Army

and Navy, and in its interpretation and in the interpretation of the act following care should be taken to, if possible, determine from the acts themselves the intent of the legislative branch of the Government in the enactment of such laws.

June 15, 1917, the President approved an act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes. (40 Stat. 182.) This act contains under the heading "Emergency shipping fund" the following (the language to which particular attention will be invited is italicized by us):

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * *

(b) To *modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships, or materials.*

* * * * *

Whenever the United States shall cancel, modify, suspend, or requisition any contract * * * in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover

such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, * * *

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: * * *

The word "person" as used herein shall include any individual, trustee, firm, association, company, corporation, or contractor.

* * * * *

The word "*material*" shall include stores, supplies, and *equipment for ships*, and everything required for or in connection with the production thereof.

* * * * *

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

The language in the aforesaid acts is plainly unambiguous. Giving to the language used the ordinary import of its words, the power is given the President to cancel all and every contract for the building, production, or purchase of ships or material within the bounds of constitutional limitation. The word "any" as used in the act means any and every.

Ex parte Christy, 3 Howard, 292, 315.

Slaughter House cases, 16 Wallace, 36, 80.

The Mary Ann: Plumer, Claimant, 8 Wheaton, 380, 388.

When a statute is expressed in plain and unambiguous language the conclusion must be that the lawmaking body intended to mean what was plainly expressed. In such case there is no room for construction.

State Tonnage Tax Cases, 12 Wall. 204, 217.

Crawford v. Burke, 195 U. S. 176, 189.

The Supreme Court of the United States has disposed of the matter of the resort to extraneous facts and circumstances, including legislative discussion and debate for interpreting the statute:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain, and if the law is within constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.

Lake County v. Rolins, 130 U. S. 662, 670, 671.

Bate Refrigerating Company v. Sulzberger, 157 U. S. 1, 33.

United States v. Lexington Mill & Elevator Company, 232 U. S. 399, 409.

United States v. Bank, 234 U. S. 245, 258.

Where the language is plain and admits of not more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Hamilton v. Rathbone, 175 U. S. 414, 421.

Caminetti v. The United States, 242 U. S. 485.

It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it.

Olive v. Walton, 33 Miss. 103, 114.

Green v. Weller, 32 Miss. 650.

Burr v. Dana, 22 Cal. 11.

Woodruff v. State, 3 Ark. 285.

Wassell v. Tunnah, 25 Ark. 101.

Green v. State, 59 Md. 123.

The subject of these acts is "any existing contract." The object intended to be accomplished is expressed in the act of March 4, 1917 (Rec. p. 149), "to secure the more economical and expeditious delivery of materials"; that in the act of June 15, 1917, while not expressed in exact words, is however, a clear and evident intendment, "to secure the more economical and expeditious delivery of materials" and "to enable the Government to stop the production of ships and materials no longer required in the national defense." This latter intendment is clearly shown by the language used limiting the authority to "cease six months after a final treaty of peace."

The court will take judicial notice that in all wars hostilities cease a year or more before the treaty is signed and that there would naturally be no reason to secure further materials from the date hostilities cease.

It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute taken and com-

pared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion.

The words of a statute, if of common use, are to be taken in their natural and ordinary signification and import, and if technical words are used they are to be taken in their technical sense; * * *. (1 Kent Comm., par. 462.)

The mere literal construction ought not to prevail if it is opposed to the intention of the legislature, apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, the law requires that construction to be adopted.

United States v. Bassett, 2 Story, 389, 393.

The converse of this is true; therefore the literal construction ought to prevail if not opposed to the intention of the legislature apparent from the statute.

If the legislature use words which have received a judicial interpretation they are presumed to be used

in that sense, unless the contrary intent can be gathered from the statute.

McKee v. McKee, 17 Md. 352.

Huddleston v. Askey, 56 Ala. 218.

Posey v. Pressley, 60 Ala. 243.

Dawson v. Dawson, 23 Mo. App. 169.

"Any" has received such interpretation (*Supra* p. 6).

In view of the fact that it has been contended that these statutes are ambiguous, attention is invited to the fact that these statutes are *in pari materia*. Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. (36 Cyc. 1147.)

In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject (*United States v. Trans. Mo. Freight Association*, 24 L. R. A. 73), or having the same general purpose (*Peoples Bank v. Patterson Savings Bank*, 10 New Jersey Equity 13), should be read in connection with it (*Converse v. United States*, 21 Howard 463; *United States v. Freeman*, 3 Howard 556) as together constituting one law. (*Seward Company v. Aetna Life Insurance Company*, 90 Fed. 222.)

The endeavor should be made by tracing the history of legislation on the subject (*Struthers v. People*, 116 Ill. Appeals 481) to ascertain the uniform and consistent purpose of the legislature (*State v. Omaha Electric Co.*, 75 Nebr. 637, 648) or to discover how the policy of the legislature with reference to the subject

matter has been changed or modified from time to time (*Stock v. Prentice*, 43 Colo. 17).

With this purpose in view, therefore, it is proper to consider not only acts passed at the same session of the legislature but also acts passed at prior and subsequent sessions.

(*Jackson County v. Branahan*, 169 Ind. 80.)

The act of March 4, 1917, was passed "to enable the President to secure the more economical and expeditious delivery of materials," etc., and specifically limits this power so that it "in time of national emergency shall cease on March 1, 1918." The act places no specific limitation "in time of war" other than what the words themselves imply. The act of June 15, 1917, does not contain a provision to enable the President to secure more economical and expeditious delivery of materials. Authority was granted under said act to "cease six months after a final treaty of peace shall be proclaimed between the Government and the German Empire."

There has been doubt expressed as to the intent of these statutes and as to their meaning. It is respectfully submitted that if any ambiguity is, in the minds of the court, deemed to exist in any one of these statutes a careful consideration of the two acts together would clear such ambiguity.

One of the doubts raised up by the legal profession and by a decision of the Comptroller of the Treasury is as to the applicability of these laws to Government contracts, it being contended that the laws are only applicable to contracts between individuals. It is

respectfully submitted that to place such construction upon any or both of these laws it would be necessary to do violence to the exact language used. In the act of March 4, 1917, power was given covering "any existing contract," and in the act of June 15, 1917, "any existing or future contract." Language could not be plainer.

These laws were enacted in the interest of the public welfare and should be liberally construed with a view to promote the object in the mind of the legislature. (38 Cyc. 1173.) What was the intention of the Congress when it passed the act of March 4, 1917? The intention was clearly expressed, "to enable the President to secure the more economical and expeditious delivery of materials," etc., and he was empowered "to modify or cancel any existing contract for the building, production, or purchase of ships or war material."

For purpose of illustration let us assume all the large shipyards in the United States had contracts for the building of battleships or other vessels for the Government, which contracts for their execution required all the facilities of the shipyards. Would it not be fallacious to state that the act of March 4, 1917, which was for torpedo-boat destroyers, submarine chasers, and other small craft, did not apply to such contracts?

Again attention is invited to the exact language "any existing contract." Could not the President, acting through the Secretary of the Navy, have modified or canceled any such existing contract?

It is submitted that he could. The only restriction thereon is to be found in the act itself, which requires the President to make "just compensation."

This construction placed upon these acts by the Secretary of the Navy, whose duty it was to execute them on behalf of the President, is entitled to great consideration, and such construction should not be disregarded and overturned unless it is clearly erroneous. (36 Cyc. 1140, 1141, and cases therein cited; see also *La Belle Iron Works v. The United States*, 55 C. Cls. 462.) In the last-named case we find, at 466, "that where the act is ambiguous or uncertain, the construction of it by the administrative officers charged with its execution is entitled to great respect."

It is contended, however, that this law is not ambiguous. There is no ambiguity to be found in the language used. To place such construction upon the statute as has been attempted would, it is submitted, do violence to its specific language, which can not be done unless it is susceptible of two or more different meanings or applications *without* doing violence to its terms. (33 Cyc. 1118.)

The act of March 4, 1917, contains a limitation on the powers to be exercised thereunder as to their purpose, and in that the powers are specifically terminated March 1, 1918, if only a national emergency exists.

The act of June 15, 1917, contains no limitation as to the purpose for which the powers thereunder are conferred, and the limitations as to its termination

are extended until six months after the treaty of peace is signed. What was the intention of Congress in this act? The act was evidently not for the sole purpose of "securing the more economical and expeditious delivery of materials," etc. To have set forth that as the purpose of the act, which was not to terminate until six months after the signing of the treaty of peace, would in itself be an absurdity. It is submitted that the evident intention was to enable the President to cancel contracts for either the purpose of speeding up production during the war or terminating Government contracts whenever in the public interests the President should deem such action proper.

The provisions of the act of June 15, 1917, are provisions particularly applicable to the instant case, and for the reasons above set forth, the President, acting through the Secretary of the Navy, or the officers under him thereunto authorized, had power to modify or cancel a contract of the character of the one in controversy. The material was antiaircraft gun mounts and sights for ships of the Navy. The contract was one capable of being modified or canceled under the law, and the contract was canceled. (Record, pp. 120 and 125.)

Contract, Department No. 1498, must have been entered into under the law as it existed at the time the contract was made, namely, May 14, 1918. The Court will take judicial notice of the fact that war was in existence, that the acts of March 4, 1917, and of June 15, 1917, were in existence and operative

at that time, and, if the court shall so find, that the Navy Department had power to cancel the contract and was obligated thereunder to make just compensation to the claimant herein.

In their contention for anticipated profits under the contract, claimant has placed reliance upon cases all of which are based upon a wrongful cancellation or breach. It is admitted that for such cancellation or breach the contractor would be entitled to such proven profits, but it is respectfully submitted that in the instant case there was no such wrongful cancellation or breach. The decisions in the case of *United States v. Speed*, 8 Wallace 77; *United States v. Behan*, 110 U. S. 388; *United States v. Purcell Envelope Company*, 249 U. S. 313, and all other cases cited in the brief for claimant are based upon this primary factor, i. e., the wrongful cancellation or breach of the contract in each case.

Because of the existence of the act of June 15, 1917 (40 Stat. 182), it was the understanding of the parties that the Government had the power to cancel the contract at any time, and having so canceled the other party did not have the right to perform. Performance should cease when the Government should so elect and the contractor was only entitled to just compensation therefor. Could that just compensation possibly include the damage to which the contractor would have been entitled for a wrongful cancellation or breach? It is respectfully submitted that such interpretation would nullify the law.

The claimant in this case is entitled to no more and no less than the law of June 15, 1917, allows—that is, just compensation. With this in view the Court of Claims determined the just compensation to which claimant was entitled, and that just compensation did not include anticipated profits. Anticipated profits are simply and solely payment for the franchise right to complete that which the Government and the claimant in this case, in the light of the law, contracted could be terminated at any time the President saw fit.

It was not the intention of Congress to authorize the repudiation of a contract by an executive department of the Government, which could be done without authorization by Congress, nor was it the intention of Congress that in authorizing the cancellation the Government should be in the position of a violator of the contract. Congress by its act gave formal notice that all contracts were subject to termination at all times in the interest of the United States, but made the wise provision that just compensation should be paid should it become necessary to exercise the power.

Congress enacted these laws to empower the President to utilize every possible facility to win the war, and after the cessation of hostilities to save the Government from the expense of acquiring property which was not needed, and authorized the cancellation of and relief from the obligations of manufacturing contracts covering such property.

Where a contract is entered into and said contract contains a cancellation clause, or, as in this case, the contract was entered into with knowledge that under the law the President could terminate it at any time, such contract should be canceled in accordance with its terms and the law.

What does the contract and the law provide with reference to the instant case? It is submitted that the Government may modify or cancel the contract at any time, but must make "just compensation."

Counsel for the United States believe that the opinion in the instant case of the Court of Claims, delivered by Downey, Judge, and concurred in by Hay, Judge, Graham, Judge, Booth, Judge, and Campbell, Chief Justice, is sound and adopts the reasoning contained therein as its argument against each and every of the specifications of error set forth by claimant in its brief.

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,

Solicitor General.

ROBERT H. LOVETT,

Assistant Attorney General.

ALFRED A. WHEAT,

Special Assistant to the Attorney General.

ALEXANDER H. McCORMICK,

Special Assistant to the Attorney General.



**TRANSCRIPT
OF
RECORD**

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 480.

HENRY FREYGANG AND ALBERT A. TROCON, PARTNERS
DOING BUSINESS UNDER THE FIRM NAME OF THE
MIDLAND BRIDGE COMPANY, APPELLANTS,

v.s.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 12, 1922.

(29,030)

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271452 CHICAGO, ILLINOIS 60616

1967-1968 EDITION

(29,080)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

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MIDLAND BRIDGE COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

No. 34735.

HENRY FREYGANG AND ALBERT A. TROCON, Partners, Doing Business under the Firm Name of The Midland Bridge Company,
v.

THE UNITED STATES.

I. *Petition.*

(Filed November 18, 1920.)

To the Honorable the Court of Claims:

The claimants respectfully represent:

I. That they are partners doing business under the name and style of the Midland Bridge Company and have their principal office at Kansas City, in the State of Missouri.

II. On the 16th day of July in the year 1918, the claimants entered into a contract with the United States acting through the United States Shipping Board Emergency Fleet Corporation as the agent for the United States, a copy of which contract is annexed to this petition and marked Exhibit "A."

In said contract it was recited that a previous contract had been made between the parties for the construction of six (6) wooden hulls, that it was decided to cancel said contract and said contract is thereby cancelled by the contract of July 16, 1918.

It was further provided that the contractor should construct in accordance with the owner's plans and specifications, and under the rules and regulations of the American Bureau of Shipping, ten (10) complete 3-masted wooden schooner barges of 500 tons deadweight capacity, with the following proviso added thereto:

"Provided However, that if for any reason whatsoever the Owner thereafter deem it inadvisable to proceed with the construction of any of the aforementioned hulls or barges, and notifies the Contractor to that effect in writing, the Contractor shall comply with the order of the Owner in that regard, with an obligation on the Owner, however, to substitute other hulls or barges of different design or size, which is agreed the Contractor shall construct under the terms and conditions hereof, for a fee to be determined by the Owner, but which shall be in proportion to the fees herein to be paid, according to the character and design of the substituted boat."

It was further provided in said contract that said Fleet Corporation representing the United States should pay the cost, the items of which were therein specifically defined, of all the work to be done by the claimants, and in consideration thereof should pay to the con-

tractor in addition to the cost the sum of six thousand dollars (\$6,000) for each of said ten barges.

III. Thereupon the claimants diligently proceeded with the construction of said barges and were prepared to deliver the same within the times respectively required by the contract, but prior to the arrival of the time for the delivery of the first of said barges, which was the first of January, 1919, the said Fleet Corporation, acting for and on behalf of the United States, on the 28th day of October, 1918, notified the claimants to suspend all operations.

3 The claimants did suspend operations on eight (8) of the said barges, in pursuance of said order; and thereupon the claimants applied to said Fleet Corporation for the payment of all costs incurred under said contract, in accordance with the terms thereof, and also for the payment of the agreed fees for service in the construction of all ten of said barges.

IV. Thereafter on the 14th day of April, 1920, another contract was entered into by and between claimants and the Fleet Corporation, representing the United States, a copy of which is annexed to this petition as Exhibit "B." It was thereby agreed that said Fleet Corporation, representing the United States, should pay to the claimants actual costs incurred on account of said barges, work on which had been suspended as aforesaid, together with all costs of that description for which the claimants were liable to their subcontractors.

In said agreement of settlement the following provisions were made in regard to fees on the cancelled barges:

Article V. The Owner shall pay to the Contractor the sum of nine thousand dollars (\$9,000) as an advance payment on account of fee for the barges which are hereby cancelled.

Article VI. It is understood and agreed that the Contractor expressly reserves unto itself the right to sue the Owner for such damages in the form of said fees for cancelled barges which are claimed by the Contractor in addition to the \$9,000 hereinbefore provided to be paid, and if upon the final outcome of any such suit, it shall be determined that the Owner is liable to the Contractor for an amount in excess of the \$9,000 hereinbefore provided, the Owner shall pay to the Contractor such additional amount so determined."

4 V. In pursuance of the agreement contained in Article VI of said contract of April 14, 1920, the claimants hereby claim against the United States as principal on whose behalf the contract was executed the following amounts:

Fees as agreed on for eight (8) cancelled barges at \$6,000 each	\$48,000
Less advance payment made by said Fleet Corporation to the claimants in accordance with Article V of said contract..	9,000

Balance due..... \$39,000

which amount claimants hereby claim.

VI. This claim is based, in addition to the contracts of July 16, 1918, and April 14, 1920, hereinbefore referred to and the full texts of which are annexed to this petition, upon the following laws of the United States and Executive Order of the President thereunder:

Shipping Act of 1916, approved September 7, 1916, (Chapter 451, 39 Stat. 728), particularly Section 3, creating a United States Shipping Board; Section 5, authorizing the Board to have vessels constructed and equipped in American shipyards; and Sec. 11, authorizing the Board to form, under the laws of the District of Columbia, a corporation for the construction, etc., of merchant vessels in the commerce of the United States; and under which the Shipping Board Emergency Fleet Corporation was established and incorporated.

Deficiency appropriation act, approved June 15, 1917 (Chapter 201, 40 Stat. 1022), authorizing the President to place an order with any person for such ships or material as may be required for the necessities of the government during the period of the war, and to purchase and take over the title to any ships in process of construction or thereafter to be constructed, and authorizing the President to exercise the power and authority thereby vested in him, and to expend the money therein and thereafter appropriated through such agent or agents as he shall determine from time to time.

Executive order of the President made in pursuance of said last named act, whereby he directed "that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction." A full copy of said Executive order is annexed to this petition as Exhibit "C."

Merchant Marine Act of 1920, approved June 5, 1920 (Chapter 250, 41 Stat. 988), repealing certain previous acts and parts of acts, but providing that all contracts or agreements lawfully entered into before the passage of said act, under any acts or parts of acts so repealed, shall be assumed and carried out by the United States Shipping Board.

VII. The claimants are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States. The claimants are the owners of this claim; and the claimants claim thirty-nine thousand dollars (\$39,000).

KING & KING,
Attorneys for Claimants.

6 STATE OF MISSOURI,
 County of Jackson, ss:

Albert A. Trocon being duly sworn, deposes and say:- I am one of the claimants in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information and belief.

ALBERT A. TROCON.

Subscribed and sworn to before me this 5th day of November, 1920.
[SEAL.]

CECIL STONE,

Notary Public.

My commission expires Dec. 12, 1923.

7

EXHIBIT "A."

Contract made this sixteenth day of July, 1918, between Henry Freygang and Albert A. Trocon, copartners doing business under the name, Midland Bridge Company, party of the first part (herein called the Contractor), and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia, representing the United States of America, party of the second part (herein called the Owner).

Whereas the Contractor by a contract dated July 20, 1917, agreed to construct for the Owner six (6) wood hulls, according to the terms and conditions set forth in said contract, and

Whereas the Contractor under said Contract of July 20, 1917, and in the performance thereof was required by orders of the Owner to make changes in plans and specifications, for which and additional reasons the Contractor alleges it has been damaged and has suffered losses and has claims against the Owner amounting to approximately \$136,000.00, the just and fair settlement of which it is believed will be impossible, and will lead to dissatisfaction, disputes and delays, and

Whereas it now appears that the Contractor, under the terms of said contract of July 20, 1917, if the same were performed, would have an interest in the plant where said hulls are being built, the determination of which interest and the proper apportionment thereof to Contractor would be difficult and unsatisfactory to both parties, and

Whereas it is the desire of both parties to cancel said contract of July 20, 1917, and to settle all claims thereunder, and to settle and determine now, the rights of the respective parties in said plant and to provide by a new contract for completing the work to be done under said contract of July 20, 1917, and for doing the additional work provided for herein.

Now Therefore, in consideration of the compromise settlement of the rights and obligations of the parties under said contract of July 20, 1917, as hereinafter defined, and of the mutual covenants and agreements herein contained, it is agreed as follows:

8

I.

Cancellation of Old Contract and Settlement of Rights and Obligations Thereunder.

- (1) Said contract of July 20, 1917, is hereby cancelled.
- (2) The Contractor hereby acknowledges complete reimbursement for all expenditures made and full satisfaction of all payments due it under said contract of July 20, 1917, and/or any order, authorization, agreement or promise, either verbal or in writing, given or alleged to have been given by the Owner or any of its agents or representatives in connection with said contract or the performance thereof, it being clearly understood that the Contractor hereby waives all right to receive any profit or remuneration whatsoever for services performed or work done under said contract.
- (3) The Contractor hereby expressly waives all damages and all claims of every kind and character due or alleged to be due it under or because of said contract of July 20, 1917, and/or any transactions which occurred in the performance thereof, and hereby releases and discharges the Owner from any and all obligations or liabilities under or by reason of said contract.
- (4) The Contractor hereby expressly waives all claims to ownership in said hulls and in the plant where the same are being constructed and in all material, machinery, tools, equipment and appurtenances therein, except the machinery, tools and equipment supplied by the Contractor, and hereby sells, transfers and assigns to the Owner all its right, title and interest in said hulls and plant and in all the material, machinery, tools, equipment and appurtenances therein except the said machinery, tools and equipment supplied by it. In furtherance of the intent and purpose of this paragraph, it is agreed that the Contractor, with representatives of the Owner, will forthwith cause an inventory to be made of all the material, machinery, tools, equipment and appurtenances at said plant of 9 every kind, belonging both to the Owner and to the Contractor, clearly classifying therein the property of the Owner and the property of the Contractor, and will cause said inventory to be filed with the Owner, and for the purpose of further protecting the Owner, will execute and deliver to the Owner a Bill of sale transferring to the Owner a good and sufficient title, free and clear of all liens and encumbrances, to all of said material, machinery, tools, equipment and appurtenances designated in said inventory as the Owner's property.
- (5) In full payment for Contractor's entire interest in said plant, and in all the material, machinery, tools, equipment and appurtenances therein, except said machinery and equipment furnished by the Contractor, the Owner will pay the sum of sixty thousand dollars (\$60,000) if and when the original six hulls are completed and accepted by the owner as hereinafter provided, one-sixth of said sum,

or ten thousand dollars (\$10,000), to be paid to the contractor at each of said hulls is completed and accepted by the Owner.

(6) As full reimbursement and satisfaction for all expenditures made by Contractor to date on said yard and hulls, and in full payment for all overhead, including services of officials, managers, superintendents, clerical help, etc., rendered to date, both at yard office and Kansas City Office, and in full settlement of sundry small tools, fittings, etc., sold by Contractor to the Owner, and for which payment has not been made, list of which is on file with the Owner's District Supervisor for the Sixth District, and in full satisfaction of everything that is due Contractor under said contract of July 20, 1917, including all disputed accounts and items which the Contractor heretofore has claimed should be allowed, the Owner will pay to the Contractor, within thirty (30) days from date hereof, the sum of \$19,540.32.

(7) While the Owner, in accordance with the cancellation provision hereof, hereby releases and discharges the Contractor from the future performance of said contract of July 20, 1917, it is
10 expressly agreed that the Contractor is not, by reason of anything herein contained, released from liability for the proper performance by it to the date hereof of all matters and things by it to have been performed in said contract, this agreement being in no wise intended to release the Contractor from its obligation to have constructed said hulls to date hereof according to plans and specifications and orders of the Owner.

II.

Work to be Done.

The Contractor shall install all machinery, appliances and equipment at said plant and shall make all extensions and additions thereto which may be ordered by the Owner which in the judgment of the Owner are necessary to properly and expeditiously do the work hereunder contracted to be done.

(2) The Contractor shall complete, under the rules and regulations of the American Bureau of Shipping, said six (6) hulls partly completed, according to the original plans and specifications, with amendments thereto and modifications thereof which have been made to date by the Owner and of which the Contractor has been notified, which original plans and specifications as thus amended and modified are by reference made a part of this contract.

(3) The Contractor shall construct, in accordance with the Owner's standard drawings and specifications (ferris type) with amendments to date inclusive, which are hereto attached and made a part hereof, under the rules and regulations of the American Bureau of Shipping, two wood hulls suitable for cargo-carrying steamers of an estimated deadweight capacity of 3,500 tons.

(4) The Contractor shall construct, in accordance with the Owner's plans and specifications hereto attached and made a part hereof, under the instructions of the Owner, and under the rules and regulations of the American Bureau of Shipping, ten (10) complete 3-masted wooden schooner barges of 2,500 ton dead-weight capacity, Standard Design SD-67.

11 Provided however, that if for any reason whatsoever the Owner her-after deems it inadvisable to proceed with the construction of any of the aforementioned hulls or barges, and notifies the Contractor to that effect in writing, the Contractor shall comply with the order of the Owner in that regard, with an obligation on the Owner, however, to substitute other hulls or barges of different design or size, which it is agreed the Contractor shall construct under the terms and conditions hereof, for a fee to be determined by the Owner, but which shall be in proportion to the fees herein to be paid, according to the character and design of the substituted boat.

III.

Organization.

The Contractor shall, as nearly as possible, maintain its present organization and personnel at said shipyard, and shall, but only as ordered in writing by the Owner, perfect the same and acquire such additional superintendents and other agents and employees, including the proper administrative officers, as may, in the opinion of the District Supervisor, or other duly authorized representative of Owner, be necessary to carry on the work herein contracted to be done. But the District Supervisor or other representative of the Owner possessing equal or higher authority, may at any time remove from the work to be done hereunder and dispense with the services of any officer, manager, superintendent, auditor, or any workman or employee of Contractor. Nothing herein contained shall be construed as an obligation on the Owner to allow as costs, salaries paid to administrative officers except as herein provided.

IV.

Delivery Dates.

It is agreed that time is of the essence of this contract, and the Contractor agrees to begin the work herein and to complete the same as soon as possible, and to deliver said hulls according to said drawings and specifications to the Owner, afloat at Houston Ship Channel, Texas, as follows:

12 The original six hulls to be completed shall be delivered respectively on August 1, August 10, August 20, September 1, September 15th and October 1, 1918.

The two Ferris type hulls shall be delivered respectively on January 1 and February 1, 1919.

The ten barges shall be delivered respectively on January 1, 1919, January 15, 1919, February 1, 1919, and one every thirty (30) days thereafter.

Adherence to Delivery Schedule.

In lieu of a penalty clause to insure adherence by the Contractor to the delivery schedule herein provided, it is expressly agreed that in exercising the right hereinafter reserved in the Owner to forfeit this contract for failure to make satisfactory progress, the Owner may use the delivery dates herein fixed and Contractor's likelihood of not complying or complying therewith at any stage of the work, as a basis of satisfactory progress, and may act accordingly in declaring or not declaring the contract forfeited.

V.

Extension of Time.

If the Contractor be delayed or obstructed in the performance or completion of the work provided for in this contract by the delays, neglect or default of the Owner, or by reason of alterations or additions by the Owner, or by reason of strikes, fire, lightning, earthquake, flood, riot, insurrection or war, or by reason of suspension of deliveries of machinery or from any other cause beyond the control of the Contractor, beyond the time of delivery herein fixed, the same shall be extended for such a period of time equivalent to the time lost by the reason thereof, which shall be determined by the Owner.

VI.

Payment for Work and Material by Controlled Account.

13 The total actual cost as hereinafter defined of doing the work herein contracted to be done, both on yard and hulls, shall be paid by the Owner in the following manner:

In order to provide the cash funds necessary for carrying on the work to be done under this contract, the Owner will from time to time deposit in advance to the credit of the Owner, in such bank or banks as may be agreed upon, such sums as are deemed necessary in the opinion of the District Supervisor, or other duly authorized representative of the Owner, to carry out the work to be done under this contract. Such sums shall be withdrawn and used only in payment for the work contracted to be done hereunder, as approved by and upon checks countersigned by the duly authorized representative of the Owner, and each payment shall be credited as payment on account of the cost of the shipyard and/or hulls, as the case may be. Any interest paid by the bank or banks on such deposits is the property of the Owner, and upon the final completion of this contract or upon forfeiture of this contract by the Owner,

upon default hereunder upon the part of the Contractor, the Owner may withdraw without the signature of the Contractor any balance on hand in any account established hereunder.

VII.

Actual Cost.

For the purpose of this contract the actual cost of the work herein contracted to be done, including the maintenance and operation of said shipyard, is defined as follows:

- (a) The net cost, including freight and other transportation costs, but deducting all discounts, rebates, etc., of materials, machinery, tools and equipment entering into or expended in the execution of the work herein contracted to be done on yard and hulls.
- (b) The cost of direct labor employed in the execution of said work.
- (c) The running expenses of said yard, including such rental, and taxes, thereon as are paid, the cost of necessary repairs and maintenance, light, heat, power and insurance, including fire, liability and compensation insurance, and any other expenses applicable and necessary, and made in connection with the work herein contracted to be done, which are approved by the District Supervisor or other duly authorized representative of the Owner. Income taxes, excess profit taxes, and any similar taxes which may be assessed against or paid by the Contractor, shall not be treated as actual costs, but shall be paid by the Contractor.
- (d) Losses actually sustained in connection with the work herein contracted for, including losses from fire, floods, storm, riot, vandalism, acts of God, acts of war, or other casualties, and not compensated for by insurance or otherwise.
- (e) Salaries and other expenses not herein specifically mentioned, whether considered overhead or otherwise, which are approved by the District Supervisor, or other duly authorized representatives of the Owner, whose decision thereon shall be final, but always with the right reserved in the Home Office of the Owner to change or revoke any action of its said District Supervisor or other authorized representative made in this regard.
- (f) A depreciation of one and one-half per cent ($1\frac{1}{2}\%$) per month on all machinery and equipment furnished by the Contractor now at said shipyard and actually used in the work to be done under this contract, a complete list of which, with valuation agreed upon, on which said depreciation shall be computed, is on file in the office of the District Supervisor of the Owner for the Sixth District, and such additional machinery and equipment as the Contractor may, at the request of Owner's District Supervisor, furnish, the value of which, on which said depreciation shall be computed, shall be deter-

mined by said District Supervisor. Provided, however, that when in the judgment of the Owner's District Supervisor, any or all of said machinery and equipment shall no longer be required for the completion of the work to be done under this contract, the Owner may notify the Contractor in writing to that effect and the payment of said depreciation shall thereupon cease as to machinery and equipment which shall no longer be required.

15

VIII.

Orders for Materials.

The Owner shall have control through its authorized representatives of all orders for materials, machinery, equipment, supplies and other purchases and commitments made under this agreement for both yard and hulls, and all contracts and orders placed by the Contractor shall be in the name of the Owner by the Contractor, and shall be first approved in writing by the Owner, who shall always keep at said yard a representative for this purpose, and it is understood that the Contractor shall assume no pecuniary liability under or by reason of such obligations where made with the written approval of the Owner.

The materials and appliances to be used in the work herein contracted to be done shall be ordered by the Contractor, who will receive the same and make payment from the funds deposited by the Owner, as provided in Article VI hereof, direct to the individual firm or corporation with whom the order has been placed, at the price stipulated in the order and in accordance with such terms of payment as may be arranged by the Contractor, with such individual firm or corporation.

Manner and Priority of Obtaining Materials and Equipment.

It is recognized, in view of war conditions, that it may become necessary for the United States to exercise complete control over the manner and priority in which materials, supplies and equipment necessary for the work hereunder are obtained by, or furnished, to the Contractor. It is agreed between the parties hereto that if required by the Owner and/or the United States, the Contractor will promptly submit to the Owner and/or the United States a classified schedule of the Contractor's requirements for all materials, supplies and equipment to be used under this contract, and copies of any or all contracts, agreements or orders for such materials, supplies or equipment, and the Contractor hereby agrees that it will promptly comply with, and be bound by any and all instructions issued by the Owner and/or the United States with respect to such contracts, agreements or orders for materials, supplies and equipment.

16

IX.

Contractor's Fee.

In consideration of the faithful performance of this agreement by the Contractor, the Owner shall pay the Contractor for services in doing, to the satisfaction of the Owner, all the work which the Owner may order to be done at and upon said yard, as herein provided, and for completing the construction of said two Ferris type hulls, the sum of eight thousand dollars (\$8,000.00) per hull, and for constructing the ten barges as herein provided, the sum of six thousand dollars (\$6,000.00) per barge for each of said ten barges, said fee to be paid as to each hull and barge respectively when the same is delivered to and accepted by the Owner, and in addition thereto, shall pay to the Contractor one-half of the saving effected if Contractor builds said two additional Ferris type hulls at an average actual cost under \$360,000.00 the estimated cost thereof per hull, and said \$360,000.00, it being definitely understood that the fee herein provided is for any and all work on the yard which the Owner may order as herein provided, as well as on hulls and barges; that the Contractor in consideration of the compromise settlement herein made, shall complete the original six hulls now under construction without fee or remuneration of any kind; that the said purchase price of \$50,000.00 for Contractor's interest in said yard and said reimbursement of \$19,240.32 herein agreed upon, and said fee on new hulls and barges as herein provided, and the amount which the Contractor may earn by building said Ferris hulls for less than \$360,000.00 each, shall be all the remuneration of any kind whatsoever which the Contractor shall receive hereunder, excepting
17 any larger fee that may be paid for substituted hulls or barges of a different type or design as provided in Article II hereof.

X.

Workmanship and Materials.

The workmanship on said vessels in detail and finish in all parts shall be first-class and of the very best quality, and shall at all times be subject to the inspection of the Owner's inspectors and representatives who may reject any unfit workmanship or materials, either before or after said materials are put or worked into construction. The materials and parts shall be of the quality and characteristics best adapted to the various purposes for which they may be used, and shall conform to the requirements and specifications of the Owner and American Bureau of Shipping.

The Contractor shall supply such assistance as may be required by the inspectors of the Owner in making any tests and inspections of such materials and parts at the shipyard considered necessary by such inspectors or surveyors.

XI.

Inspection.

The vessels may be inspected during the progress of the work by representatives of the Owner and surveyors of the American Bureau of Shipping. All expense of inspection (other than that of the Owner) and certificates shall be considered as part of the actual cost of the hulls. In addition to the surveyors of the American Bureau of Shipping, the Owner will employ one or more inspectors of recognized ability in their profession to supervise and assist in the construction of the hulls. They, and their assistants, described herein as the Owner's inspectors, shall be required to watch closely the construction. If the decision of any inspector or any question is not,

in the opinion of Contractor, for the best interest of the Owner or Contractor, the Contractor shall immediately notify the District Supervisor of the Owner in writing to that effect. All questions arising under the contract at the shipyard shall be referred to the Owner's District Supervisor, and his decision on all questions when rendered under his general authority or after approval by the Owner shall be binding, subject in all cases to appeal, as provided in Article XXIV hereof.

XII.

Alterations.

The Owner shall have the right, but only by orders in writing, to make such alterations, omissions, additions or substitutions as the Owner may deem necessary. The Contractor agrees to execute and to carry the same into effect as though such alterations, omissions, additions or substitutions were originally provided for in the contract, without any additional fee or remuneration of any kind unless said alteration, omission, addition or substitution is so material as to constitute a change in design, in which event the amount to be paid to the Contractor as its fee shall be increased to an amount to be determined by the Owner. If by reason of any alteration, omission, addition or substitution ordered by the Owner, or if by reason of failure of the Owner to supply material or facilities, or if for any other reason whatsoever the Contractor is delayed in completion of the vessel or vessels so affected, the time of delivery shall be extended, but the Contractor shall not be entitled to any damages or additional remuneration because of said delay.

XIII.

Forfeitures.

In the case of any failure or omission of the Contractor at any stage of the work, prior to completion, from any cause or causes, to go forward with the work and make progress toward its completion satis-

factory to the Owner, or in case of failure by the Contractor to exercise economy in the use of labor, tools, appliances and/or materials, or to use reasonable skill in the construction of said vessels
19 satisfactory to the Owner, or in case of any dishonesty by the Contractor proven to the satisfaction of the Owner, or in case of a breach by the Contractor of any of its covenants or agreements, the owner may declare this contract forfeited. In that event, the Owner may immediately enter the shipyard and take possession of it and its facilities, and of the vessels, materials and equipment, and of the machinery, tools and equipment of the Contractor, and may, by contract with another Contractor, or otherwise, proceed with the completion of said vessels, or such of them as it sees fit, either at the shipyard, with the equipment and facilities thereof, and with the Contractor's organization, tools, machinery and equipment, or such part thereof as it sees fit, or elsewhere, and use for that purpose such of said material or equipment as in its discretion seems advisable. Upon declaring such a forfeiture, the Owner shall forthwith cause to be taken and filed with the Owner a full inventory and statement of all work done or begun on or about said yard and vessels and of all material on hand, and of all machinery, tools and equipment in or about said yard, whether belonging to the Contractor or not, and whether or not used in the construction of said vessels. In case the Owner shall thus cause this contract to be forfeited, the amount to be paid to the Contractor, it is agreed, shall be that proportion of the Contractor's fee earned up to the time of such forfeiture, minus such damages as the Owner may have suffered because of such unsatisfactory progress, or failure to exercise economy, or reasonable skill, or dishonesty, or breach of contract by the Contractor, which payment shall not be made to the Contractor until all of said vessels are completed or the work otherwise terminated.

Provided However, that if the Contractor can show to the satisfaction of the Director General of the Owner reasonable industry and good faith in the prosecution of the work hereunder and that the delays or defaults have been caused by circumstances over which it had no control, the Contractor shall be allowed such opportunity as the Director General of the Owner may deem proper to complete the work.

20

XIV.

The Contractor agrees to procure as far as procurable, and thereafter maintain, such insurance in such form, on such property, to cover such contingencies, in such amounts, and for such periods as the Owner shall approve or require. The policies shall provide that the loss, if any, shall be payable to the Owner. The Owner may dispense with any or all insurance, or have the right itself to carry such risks. Should any vessel be partially or totally destroyed, or a total loss, no additional hull shall be built under this contract in order to replace it unless the Owner so directs. In the event of destruction, the Owner shall pay to the Contractor that part of the Contractor's fee earned up to the time of such loss or destruction, and still unpaid.

XV.

Casualty.

The Contractor agrees to protect the Owner and itself against any claims for accidents or casualties to employees or workmen or others in, or about the work covered by this contract by proper casualty and liability insurance, the cost of which shall be considered as a part of the cost of doing the work herein provided, or the Owner shall have the right to carry such risks.

XVI.

Patents.

The Contractor shall, to the best of its ability, protect the Owner against claims for any infringement of patents or patent rights and for the use of any patented articles embodied or to be embodied in the vessels, by suitable agreement satisfactory to the Owner as to the use of such patents or patent rights. The Owner will assume all costs, expenses and damages which it or the Contractor may be obliged to pay to procure such agreements or to pay by reason of any infringement of patent or patent rights or the use of patented articles not covered by such agreements, pursuant to decree 21 by a proper Court in any litigation involving the use of such patents, but the Contractor shall assist the Owner at the latter's expense, save for services of the Contractor's employees (which shall be furnished free of cost to the Owner) in furnishing such evidence as to the use of the patents and other matters of fact as may be required by the Owner in such litigation. The Contractor shall promptly notify the Owner in writing of any claims of infringement that may from time to time be brought to the Contractor's attention.

XVII.

All the material, tools, equipment, supplies and appliances purchased for the work to be done hereunder and not used, shall be and remain the property of the Owner, and the amount realized from the sale or other disposition thereof, and the salvage value of all tools, scaffolding, belting, hose, and similar articles, as well as of all scrap and waste, containers, etc., shall be the Owner's and credited to its account.

XVIII.

Labor and Wages.

The Contractor shall comply with all instructions as to wages and conditions of employment of labor on this contract given to it in writing by the Owner. The Owner in its discretion will give such assistance as shall be within its power in securing and retaining the

labor necessary for the work to be done hereunder. The Contractor will promptly notify the Owner of any labor difficulties.

XIX.

Inspection Certificate.

No inspection certificate given or payment made under the terms of this contract (except final payment) shall be conclusive evidence of the performance of this contract, either in whole or in part, and no payment shall be construed to be a waiver of the right of the Owner to direct the replacement of unsatisfactory workmanship or material.

XX.

Title.

Title to all improvements, and to all material, tools, supplies, equipment and appurtenances paid for by the Owner, shall be and remain the property of the Owner, and the title to the vessels as constructed shall vest in the United States of America, and the Contractor shall be held to account to the Owner, in a manner satisfactory to the Owner as determined by its District Supervisor, for all material, tools, supplies, equipment and appurtenances which are delivered to said shipyard, and on failure of Contractor to so account for any of said material, tools, supplies, equipment and appurtenances there shall be deducted from the fee next thereafter to be paid the Contractor the value thereof, and in case there is no fee thereafter due the Contractor, from which to make said deductions, the Contractor shall be nevertheless liable and subject to suit therefor.

XXI.

Liens and Taxes.

The Contractor will keep the vessels in the course of construction, and all of the Owner's property of every kind and description at said shipyard, free and clear from all claims, liens or encumbrances of any kind or description (except liens or encumbrances accruing through the default of the Owner, and/or for which the Owner shall be responsible) and shall, before delivery of each vessel or other property of the Owner, show to the satisfaction of the Owner that same is free and clear of any claim, liens, encumbrances, except as aforesaid. The Contractor agrees that it will, to the extent that funds are available under the terms of Article VI, promptly pay for all labor, material and other services rendered to it in connection with the work under this contract. Any taxes assessed against the plant, materials on hand, or vessels under construction, shall be paid as a part of the actual cost. But the Contractor shall not pay any such taxes, except upon directions from the Owner.

23

XXII.

Account.

The Contractor shall establish and keep suitable accounts and records, which shall show the actual cost of all the work and material under this contract. The preservation of said accounts and records for a reasonable time shall be provided for by the agreement of the parties at the termination of this contract.

The accounts and records of the Contractor shall at all reasonable times be open to inspection by the Owner. All statements and accounts relating to expenditures and costs hereunder shall be made by the Contractor in such form and supported by such original papers as may be required by the Owner. The methods and principles of keeping costs shall be adequate for the determination of actual costs and shall be approved by the Owner, and to this end the Owner may send Auditors to the shipyard and to the Contractor's offices, to supervise and assist in the accounting.

Account of Costs.

The actual cost of the vessels herein contracted for shall also be computed in the manner defined in Article VII hereof, and shall be kept in such manner and segregated into such items as may be necessary for the purposes of this contract, and as designated by the Owner.

Account of Plant.

The actual cost of building, ways, dredging, plant and appurtenances, together with the cost of any alterations made to the buildings or other improvements, shall be kept in a separate detailed plant cost account and inventory, and such cost shall include, in addition to the direct cost of such buildings, ways, plant and appurtenances, a proper proportion of the overhead charges incurred in the work under this contract.

XXIII.

Control of Contractor's Officers and Employees.

24 The Owner, by its District Supervisor or other representative of equal or greater authority, shall have the right to require the Contractor to discharge and dispense with the services of any officer, manager, agent, superintendent, consulting Engineer or expert, or other employee. Final decision as to this shall rest with the Director General of the Owner.

XXIV.

Disputes.

In case the parties fail to agree as to any matter contained in or connected with this contract, or if any doubt or dispute arises as to the meaning, construction or effect of this contract, or of any of the provisions or covenants hereof, or of the plans and specifications or any part or parts thereof which are a part hereof, or as to the manner of doing the work provided for hereunder, or as to the materials used or to be used, or the time to be allowed, or the amount to be paid or allowed for alterations, omissions, additions or substitutions, or as to any other particular, the matter shall (unless otherwise provided) be promptly referred to and determined by the Director General of the Owner and his decision in writing shall be final and binding upon the parties, except as hereinafter provided.

In case the Contractor shall deem that it is aggrieved by any decision of the Director General as to any disputed matter hereunder of any kind regarding any matter, and shall give written notice to the Owner to that effect within ten (10) days after said decision of the Director General which the Contractor deems adverse to it, such matter shall be determined by a Board which shall consist of three disinterested naval architects or engineers or experts, to be appointed, one by the Owner, one by the Contractor, and the third by the two so appointed. Such Board shall within thirty (30) days after submission of such matter to it make its determination, and its finding (made by a majority of the Board) shall be conclusive on both parties. Provided, however, that if the Contractor fails to notify the Owner in writing of its intent to appeal any decision of the Director

General within said ten (10) days after receiving written notice of such adverse decision, the decision of the Director

General shall become final and binding upon both parties without appeal to the Board herein provided for. The cost of any such arbitration shall be borne equally by the Owner and the Contractor.

XXV.

Contractor's Interest in Subcontract.

It is agreed that in the furtherance of this contract, the Contractor shall not make any contract, agreement or arrangement with any other person, firm, or corporation in which the Contractor is interested as officer, director, stockholder, or otherwise, or with any affiliated controlling or controlled firm or corporation, unless such sub-contract, agreement or arrangement and the relationship of the parties is first submitted to the Owner and its assent in writing obtained. In the event any sub-contract, agreement or arrangement is made by the Contractor except as above provided, the Owner may require the Contractor to immediately cancel such sub-contract,

agreement, in which event there shall be no liability upon the Owner, the Contractor hereby agreeing to obey the Owner's instructions with respect thereto and to save harmless and indemnify the Owner against any claim which might be made against it on account of the cancellation of such sub-contract, agreement or arrangement. The Contractor further agrees that the Owner may withhold from the payments to become due it an amount sufficient to indemnify the Owner against any claim which may be made on account of the cancellation of such sub-contract, agreement or arrangement.

XXVI.

Protection of Owner's Interests.

The Contractor, in all its acts hereunder, shall use his best efforts to protect, and subserve the interests of the Owner. The Contractor hereby agrees that it will procure all necessary permits and 26 licenses (the expense thereof to be a part of the cost of the vessels and/or plant) and obey and abide by all laws, regulations, ordinances, and other rules applying to the work hereunder of the United States of America, of the State or Territory wherein such work is done, or any sub-division thereof, or of any duly constituted public authority.

XXVII.

Control by Owner.

The Contractor shall in the performance of its agreement hereunder comply with and be bound by all legal directions and instructions, and all decisions of the Owner, or its authorized representatives, and compliance by the Contractor with any such direction, instruction or decision, shall be a justification and protection to the Contractor for any action so taken.

XXVIII.

Participation in Profits.

No member of or delegate to Congress, or Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this Article shall not apply to this contract so far as it may be within the operation or exception of Section 116 of the Act of Congress, approved March 4, 1909 (35 Stats. 1109).

XXIX.

Guaranty Regarding Commissions.

The Contractor expressly warrants that it has employed no third person or persons to solicit or obtain this contract in its behalf or to cause or procure the same to be obtained upon compensation in any

way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person or persons in consideration of such procurement or in compensation for services in connection therewith any brokerage, commission or percentage upon the amount receivable by him hereunder, and that he has not in estimating the contract price demanded by it, included any sum by reason of any such brokerage, commission or percentage, and that all moneys payable to it hereunder are free from obligation to any other persons for services rendered or supposed to have been rendered in the procurement of this contract.

It is further agreed that any breach of this warranty shall constitute adequate cause for the forfeiture of this contract by the Owner and that the Owner may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission or percentage so paid, or agreed to be paid.

XXX.

Contract not Assignable.

This contract shall not be assigned by the Contractor, nor shall any interest therein or any payment due the Contractor thereunder, without the consent of the Owner in writing.

XXXI.

It is definitely understood that said yard, and all machinery, tools, equipment, appliances and everything therein, except the machinery and equipment supplied by the Contractor as hereinbefore defined, is the exclusive property of the owner, in which the Contractor has no interest except to use the same as herein provided to do the work to be done hereunder, without any right in the Contractor to build additional vessels thereon, and that at the completion of the work to be done hereunder or at any other termination of this contract, the Contractor may be required to remove the machinery, tools and equipment supplied by it, and the Owner may operate said yard in any manner it sees fit by another Contractor or otherwise, and if and as soon as any of the shipways at said yard become vacant because of completion by Contractor of the work contracted to be done hereunder, the Owner may, in its discretion, use said way or ways as it sees fit, by itself or by another Contractor, providing it does not interfere by such use with the Contractor's doing the work which it has contracted to do hereunder.

XXXII.

Provisions to be Added if Desired.

This contract is executed and delivered upon the understanding that, if desired by the Owner, a provision, satisfactory in form and

terms to the Owner, restricting the hours of labor for laborers and mechanics employed by the Contractor or by sub-contractors, or providing for the payment of extra compensation for overtime work, will be inserted in the contract with the same force and effect as if inserted in the Contract before the execution and delivery thereof.

All conversations, correspondence, understandings and agreements of every kind heretofore had or alleged to have been had between the parties, or any of their agents or representatives, whether verbal or in writing, it is agreed, are embodied in this contract, which is now the one and only agreement between the parties with reference to this subject matter.

In Witness Whereof the parties have caused these presents to be executed and the Owner has caused its corporate seal to be hereunto affixed on the day and year above stated.

ALBERT A. TROCON,
HENRY FREYGANG,

Copartners, Doing Business as Midland Bridge Company.
UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORA-
TION.

HOWARD CONLEY,

[SEAL.]

Vice President.

29 Attest:

C. BRADFORD FRALEY,
Assistant Secretary.

Approved as to form.

Date, ____ —, ____.

WILLARD C. McNEIL,
Legal Division.

Approved: July 29, 1918.

MORRIS DORM FERRIS,
Manager Contract Division.

Approved,

ED. FREE,
Asst. Comptroller.

EXHIBIT "B."

Supplemental Agreement Affecting Contract.

393-WH and WBC.

Agreement entered into this 14th day of April, 1920, between Henry Freygang and Albert A. Trocon, a copartnership doing business under the firm name of Midland Bridge Company, in Kansas City, Missouri, (herein called "Contractor"), party of the first par-

and the United States Shipping Board Emergency Fleet Corporation, a corporation organized and existing under the laws of the District of Columbia, (herein called "Owner"), acting for and in behalf of the United States of America, (herein called "United States"), party of the second part, Witnesseth:

Whereas, a certain Contract, Contract No. 54, dated July 20th, 1917, was entered into between the parties hereto, providing for the construction and delivery of six (6) wooden hulls; and

Whereas, Contract No. 54 was superseded by a Contract between the said parties, dated July 16th, 1918, Contract No. 393-WH and WBC, (herein called "Contract"), providing for the completion of the said six (6) Ferris Hulls on a cost basis, and in addition for the construction and delivery of two (2) additional Ferris hulls on a cost plus a fixed fee of eight thousand dollars (\$8,000) each and construction and delivery of ten (10) barges on a cost basis plus a fixed

fee of six thousand dollars (\$6,000) each; and

30 Whereas, it was desirable in the public interest to suspend operations under the Contract and to that end the Contractor at the direction of the Owner suspended operations on eight (8) of the said barges on October 28th, 1918; and

Whereas, in connection with the suspended portion of the Contract the Contractor properly employed capital, made expenditures and incurred liabilities in preparation therefor; and

Whereas, the Contractor has presented claims for cost arising out of the construction of the hulls under the Contract which were not suspended in addition to claims arising out of the suspension of eight (8) barges as aforesaid; and

Whereas, the Contractor has presented additional claims for fees on account of the said suspended barges; and

Whereas, it is now the desire of the parties to compromise, settle and adjust any and all said claims of the Contractor, arising out of the Contract, the suspension and partial cancellation thereof, except as hereinafter specifically provided in Articles V and VI hereof,

Now, Therefore, in consideration of the promises and the mutual covenants herein contained, it is agreed between the parties hereto as follows:

Article I.

The Contract, in so far as eight (8) suspended barges are concerned is hereby terminated, cancelled and annulled.

Article II.

The Owner shall forthwith pay to the Contractor the sum of five thousand, eight hundred and ten dollars (\$5,810.00).

Article III.

The Contractor hereby waives all right, title and interest in and to the plant where the contract was performed, and plant equipment,

machinery and materials therein, except such equipment as was supplied by the Contractor.

31

Article IV.

(1) The Owner shall assume and settle for the Contractor any and all commitments and sub-contracts placed by the Contractor under the Contract prior to October 28, 1918, in so far as the sub-contracts and commitments were necessary for and did not exceed the requirements of the Contract.

(2) The Contractor shall have no right, title or interest in or to any of the material acquired or to be acquired under the settlement of the said sub-contracts or commitments and title to all material acquired by the Owner under the settlement of the said subcontracts and commitments shall vest in the United States.

(3) The Owner shall further settle and adjust for the Contractor all claims, demands or law suits which may have arisen or which may hereafter arise, in so far as liability on the part of the Owner for such claims, demands and law suits was established by the Contract, and nothing herein contained shall be construed to prejudice the rights of the Contractor for protection as provided in the contract.

Article V.

The Owner shall pay to the Contractor the sum of nine thousand dollars (\$9,000) as an advance payment on account of fees for the barges which are hereby cancelled.

Article VI.

It is understood and agreed that the Contractor expressly reserves unto itself the right to sue the Owner for such damages in the form of said fees for cancelled barges which are claimed by the Contractor in addition to the \$9,000 hereinbefore provided to be paid, and if upon the final outcome of any such suit, it shall be determined that the Owner is liable to the Contractor for an amount in excess of the \$9,000 hereinbefore provided, the Owner shall pay to the Contractor such additional amount so determined.

32

Article VII.

The Contractor, for itself, its successors and assigns, except as hereinbefore provided in Article VI hereof does hereby remise, release and forever discharge the Owner and the United States from any and all debts, dues, demands, sum or sums of money accounts, reckonings or claims whatsoever due or to become due in law or in equity, under or by reason of or arising out of the contract, the suspension and partial cancellation thereof, or any order, authorization, agreement or promise, either verbal or in writing, expressed or implied, given or alleged to have been given by the Owner or any of its duly author-

ized representatives in connection with the contract or any and all transactions between the parties hereto.

Article VIII.

All disbursements, settlements or adjustments made under or growing out of this agreement shall be subject to such audit or audits as may be determined by the General Comptroller of the Owner, and all opinion of such General Comptroller necessary for said audit shall be at his or at his duly authorized representatives' disposal. Any omissions, irregularities or discrepancies found by any further audit shall be subject to adjustment.

Article IX.

This agreement shall be executed in triplicate and the respective copies shall be known as Parts I, II, and III. Parts I and III, shall be delivered to the Owner and Part II shall be delivered to the Contractor. Said respective parts shall be of equal legal force and effect for any and all purposes.

In Witness Whereof, the parties hereto have caused this agreement to be properly executed and the Owner has caused its corporate seal to be hereunto effected, duly attested, on the day and year first above written.

33 Witness as to Henry Freygang,

_____.
_____.

Witness as to Albert A. Trocon,

_____.
_____.

HENRY FREYGANG,
 ALBERT A. TROCON,
Doing Business under the Firm
Name of Midland Bridge Co.
 [SEAL.] EMERGENCY FLEET CORPORATION,
 UNITED STATES SHIPPING BOARD,
 By W. S. BENSON,
 President.

Attest:

J. W. FLAHERTY,
Secretary.

Approved as to Form

W. R. COUGLEARE,
Assistant Counsel.

Approved:

FRANCIS W. McGOVERN,
Chairman Construction Claims Board.

EXHIBIT "C."

Executive Order Delegating to the Shipping Board and the Emergency Fleet Corporation the Powers Granted the President by the Emergency Shipping Legislation.

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping
34 Board shall have and exercise all power and authority vested
in me in said section of said act, in so far as applicable to and
in furtherance of the taking over of title or possession, by purchase or
requisition, of constructed vessels, or parts thereof, or charters
therein; and the operation, management and disposition of such
vessels and of all other vessels heretofore or hereafter acquired by the
United States. The powers herein delegated to the United States
Shipping Board may, in the discretion of said board, be exercised
directly by the said board, or by it through the United States Ship-
ping Board Emergency Fleet Corporation or through any other
corporation organized by it for such purpose.

WOODROW WILSON.

The White House,
11 July, 1917.

35

II. *General Traverse.*

(Filed January 18, 1921.)

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

36

III. *Argument and Submission of Case.*

On February 15, 1922, this case was argued and submitted by Mr. George A. King, for the plaintiff, and by Mr. F. E. Scott, for the defendants.

37 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.*

Entered April 10, 1922.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Facts.

I.

On July 20, 1917, the plaintiffs, Henry Freygang and Albert A. Troon, citizens of the United States, and copartners doing a contracting business under the firm name of the Midland Bridge Company (hereinafter called the plaintiff), with principal business office at Kansas City, Mo., entered into a contract with the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia, for the construction for said Fleet Corporation of six wooden hulls for cargo-carrying steamers, to be delivered at the works of the plaintiff at Houston Ship Channel, Texas, on or before July 1, 1918.

II.

The plaintiff thereupon proceeded under said contract with the construction of the necessary construction plant and the construction of said six hulls. Said hulls were not completed by July 1, 1918, and on July 16, 1918, the parties to said contract entered into a contract which provided for the cancellation of said contract of July 20, 1917, but provided for the completion of said six hulls called for thereby, and also provided for the construction by September 1, 1919, of two additional wooden hulls for cargo-carrying steamers, and 10 three-masted wooden schooner barges. A copy of said contract of July 16, 1918, is annexed to the plaintiff's petition as Exhibit A, and is by reference made a part of these findings of fact.

38

III.

The plaintiff proceeded with the work under the new contract of July 16, 1918, until October 28, 1918, when the said Emergency Fleet Corporation notified the plaintiff that said contract was canceled and ordered it to stop work and make no further expenditures under the contract.

By communications of October 29 and 31, following, to the contractors, said Fleet Corporation modified its above-noted order of October 28, by making it apply only to 8 of the 10 barges called for by the contract, and notified the plaintiff that otherwise the contract was in full force, and directed it to proceed with the work not canceled, which work was later completed by the plaintiff.

IV.

At the time of the said Fleet Corporation's order reducing from 10 to 2 the number of barges to be constructed most of the materials for the construction of all 10 of said barges had been ordered by the plaintiff and a part delivered at the construction plant. Approximately something over one-third of the material for construction had been delivered prior to January 1, 1919, owing to it not being possible to cancel certain orders for materials. The orders for the balance of the materials for the said 8 barges were canceled. The plaintiff at that time was in a position to proceed with the construction of all 10 barges and thereafter offered to proceed with the construction of the 8 barges, work on which had been ordered to be stopped, or upon barges of different character and design which might be substituted in their place by the Fleet Corporation as provided by the contract; but at no time did the Fleet Corporation direct or give permission to the plaintiff to proceed with the construction of said 8 barges or of any other substituted hulls or barges in place thereof. The action of the Fleet Corporation in reducing the number of barges to be constructed by the plaintiff was not due to any fault on the part of the plaintiff.

V.

The said construction plant and such of the plaintiff's organization as was necessary to the completion of the uncanceled portion of the contract work were maintained until the completion of such work in the fall or early winter of the year 1919, at which time the plant was dismantled and ceased to exist as such; and the construction of the said 8 canceled barges could have been supervised and carried on by substantially the same general organization as carried on the completion of the remainder of the contract work.

VI.

Henry Freygang, a member of the plaintiff's firm, was paid by the Fleet Corporation from July 16, 1918, the date of the contract in controversy, to November 30, 1919, a salary of \$350 per month, making a total sum of approximately \$5,775. George Cole, an employee of the plaintiff firm, was paid by the Fleet Corporation

from July 16, 1918, to December 15, 1919, a salary of \$500 per month, making a total sum of approximately \$8,500.

Albert A. Trocon, the other member of the plaintiff firm, spent the greater part of his time at the office of the company, at Kansas City, where he looked after the office work of the firm, including supervising other contracts than the one in controversy. During the period between October 28, 1918, the date of the cancellation of the 8 barges, and September 1, 1919, the date for the completion of the last barge and the work under this contract, as fixed by the contract, the plaintiff firm also did work on 22 other

contracts located in the States of Kansas, Oklahoma, Idaho, Missouri New Mexico, Wyoming, Arkansas, and Texas, and these matters were largely looked after by Mr. Trocon.

VII.

After the completion of the uncanceled portion of the work called for by the said contract of June 16, 1918, by reason of the failure of the Fleet Corporation to substitute other hulls or barges for the said 8 barges on which work was stopped, the plaintiff asserted a claim for a fee of \$6,000 for each of said canceled barges, making a total of \$48,000 which it claimed was due under the contract.

Upon consideration of said claim the plaintiff was finally offered the sum of \$12,000 as a compromise settlement and final adjustment of it, which the plaintiff refused to accept.

VIII.

After the refusal of the plaintiff to accept the said offer the defendant stated in a communication to the plaintiff that it would make a careful investigation as to the proportion of work done on said canceled barges and would arrive at a proportion of the fee that the plaintiff was entitled to receive based upon the portion of work performed with a view to allowing the plaintiff "to accept 75 per cent of such award and sue in the Court of Claims for the remainder." The amount so ascertained as an award was \$12,000.

IX.

Under date of April 14, 1920, the plaintiff and said Fleet Corporation entered into a supplemental contract for the settlement of certain claims asserted by the plaintiff based upon the original contract and the work performed thereunder, which supplemental contract is set forth as Exhibit B to the plaintiff's petition and is by reference made a part of these findings. There was paid to the plaintiff under this supplemental contract the sum of \$5,810 for certain expenditures claimed to have been made by it, and \$9,000 as an advance payment on account of fees for barges which were canceled.

X.

Prior to the execution by the parties of said supplemental contract there had been paid to the plaintiff under the contract June 16, 1918, the following payments called for thereunder: \$16,000, being \$8,000 each for the construction of two Ferris hulls; \$12,000 being \$6,000 each for the construction of two steel barges; \$60,-
10 000, for the plaintiff's interest in the plant at the time the original contract was made; and \$19,240.32, reimbursement for matters arising before the execution of said original contract.

XI.

Under date of July 11, 1917, the President promulgated an Executive order as follows:

"Executive Order Delegating to the Shipping Board and the Emergency Fleet Corporation the Powers Granted the President by the Emergency Shipping Legislation."

"By virtue of authority vested in me in the section entitled 'Emergency shipping fund' of an act of Congress entitled, 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes, approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels and of all other vessels heretofore or hereafter acquired by the United States. The power herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board, or by it through the United States Shipping Board Emergency Fleet Corporation or through any other corporation organized by it for such purpose."

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover \$3,000. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of three thousand dollars (\$3,000).

Opinion.

GRAHAM, Judge, delivered the opinion of the court:

This suit grows out of a contract for services on the part of the plaintiff in superintending the construction and carrying to satis-

factory completion according to the terms and conditions of
41 the contract certain ships and barges in a shipyard owned
by the defendant, for which the defendant was to furnish
the capital, and to pay all the expenses, the plaintiff to provide and
maintain an organization and the necessary force. The various sums
mentioned in paragraph 9 of the contract to be paid by the defendant,
including \$6,000 each for constructing 10 barges, were to be
in consideration of the faithful performance of the contract and "in
doing to the satisfaction of the owner all the work which the owner
may order to be done in and upon said shipyard * * *, it
being definitely understood that the fee herein provided is for any
and all work on the yard which the owner may order as herein pro-
vided, as well as on hulls and barges."

The original contract contained the following provision:

"Provided, however, that if for any reason whatsoever the owner
hereafter deems it inadvisable to proceed with the construction of
any of the aforementioned hulls or barges, and notifies the contractor
to that effect in writing, the contractor shall comply with the order
of the owner in that regard, with an obligation on the owner, how-
ever, to substitute other hulls or barges of different design or size,
which it is agreed the contractor shall construct under the terms
and conditions hereof, for a fee to be determined by the owner, but
which shall be in proportion to the fees herein to be paid, according
to the character and design of the substituted boat."

The contract was dated July 18, 1918. On October 26, 1918, the
defendant ordered the plaintiff in writing to stop the work of con-
struction on 8 of the 10 barges named in the contract. The work
under the original contract as far as the construction of the 10
barges was concerned called for completion of the last barge by
September 1, 1919, so that at the time of this cancellation about one-
fourth of the time to be devoted by the plaintiff to the superintend-
ence of the construction of these barges had elapsed. No work had
been commenced on the barges except work on certain frames for
one of the barges. All of the material had been ordered but only
a part of it had arrived on the yard. Some months later about
one-third of the material was delivered to the yard owing to the fact
that the order for it could not be canceled. The yard itself and the
organization was in a position, under the direction of the plaintiff,
to proceed with the work.

It will be seen that the defendant had a right to stop the work on
the 8 barges, as it did, and that in so doing there was no breach
of the contract. However, in case it did stop the work on these
barges it assumed "an obligation" to substitute other hulls or barges
of different design and size, which it was agreed the contractor
should construct under the terms and conditions of the contract
"for a fee to be determined by the owner, but which shall be in pro-
portion to the fees herein to be paid according to the character and
design of the substituted boat."

The defendant failed to substitute other barges and the contractor

proceeded to complete the work on the remaining two barges, the two Ferris hulls, and those hulls which were partly completed at the time the contract was entered into. Thereafter by reason of the failure of the defendant to substitute other hulls or barges for the said 8 barges on which work was stopped, the plaintiff
42 asserted a claim for a fee of \$6,000 for each of said canceled barges, making a total of \$48,000, which it is claimed was due under the contract. The defendant in consideration of this claim made the plaintiff an offer of \$12,000 as a compromise settlement and final adjustment of it, which offer the plaintiff refused to accept. As stated, the work called for by the contract was otherwise completed and the plant dismantled. On April 14, 1920, some months after it had been dismantled, the parties entered into a supplemental contract by which the original contract as to these 8 suspended barges was "terminated, canceled, and annulled."

The plaintiff under this supplemental contract was paid \$5,810 for certain expenditures claimed to have been made by it and the defendant assumed an obligation to settle and arrange all commitments and all matters under subcontracts and to adjust all claims and demands. It also thereunder paid the contractor the sum of \$9,000 "as an advance payment on account of fees for barges which are hereby canceled," and the plaintiff, it was understood and agreed, reserved "unto itself the right to sue the owner for such damages in the form of said fees for canceled barges which are claimed by the contractor in addition to the \$9,000," the owner agreeing to pay whatever sum was adjudged to be due the contractor.

It is plain that there was no breach of this contract by the defendant in stopping the work, which it had a right to do. The breach of the contract was in failing to fulfill the obligation to substitute other hulls and barges, and it therefore follows that the plaintiff's claim for damages grows out of the breach of this obligation and that the amount of the plaintiff's damages is fixed by the loss growing out of the failure to fulfill this obligation.

How have these damages been proven? It is provided that in case other hulls or barges are substituted the defendant shall have the right to determine the fee, which fee is to be in proportion to the fees to be paid in the contract "according to the character and design of the substituted boat." As no boats were substituted this method of fixing the fee gives no assistance in reaching a determination of the amount due the plaintiff. It is clear that the amount due the plaintiff, had this obligation been fulfilled, would not have been the fee fixed by the original contract. Its compensation was fixed upon another basis. It is also clear that as the plaintiff is suing for damages for breach of the contract it must prove its damages and can not rely upon the \$6,000 stated in the contract as proof.

Is there any proof in this record of the damages caused by the breach? The plaintiff relies solely upon the \$6,000 stated in the contract as proof of the amount of damages. It is clear that this was not the amount to be paid if the defendant fulfilled its obligation to supply other barges, and it can not therefore be relied upon as the measure of recovery if the obligation was not fulfilled. We are of

the opinion that there is no proof in the record of the damages caused by the breach.

So far as the recovery of damages as for a breach of the contract is concerned it is thus apparent that there can be none. But there is room for the assumption that the Fleet Corporation in canceling this contract as to the eight barges was proceeding under the act of June

43 15, 1917, rather than under the cancellation clause of the contract, and that its fixing of \$12,000 as the amount properly to be paid the plaintiff was a fixing of just compensation under that act.

It is true that the supplemental contract refers to the \$9,000 to be paid as "an advance payment on account of the fees for the barges which are hereby canceled," but in correspondence with reference to the matter, after the plaintiff had indicated its refusal to accept \$12,000 in settlement, the claims board of the Fleet Corporation informed the plaintiff that it would make a careful investigation of the matter in order to arrive at the proportion of the fees the plaintiff was entitled to receive based upon the work performed and that it "would then be allowed to accept 75 per cent of such award and sue in the Court of Claims for the remainder." The amount paid was 75 per cent of the award and the procedure outlined was proper only under the act referred to.

Upon this theory the Fleet Corporation having determined that \$12,000 was due the plaintiff of which 75 per cent was paid and accepted by plaintiff as a partial payment, and the facts failing to show that it is entitled either to more or less than said sum the plaintiff should have judgment for \$3,000, and it is so ordered.

Hay, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

44

V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the tenth day of April, A. D. 1922, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge and decree that the plaintiff, as aforesaid, is entitled to and shall have and recover of and from the United States the sum of three thousand dollars (\$3,000).

By THE COURT.

45 VI. Plaintiff's Application for and Allowance of an Appeal.

From the judgment entered by the Court of Claims in this cause on the 10th day of April, 1922, the claimants, Henry Freygang and Albert A. Trocon, Partners, trading as The Midland Bridge Company, hereby make application for and give notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed June 29, 1922.

Ordered: That the above appeal be allowed as prayed for.
June 29, 1922.

EDWARD K. CAMPBELL,
Chief Justice.

46

Court of Claims.

No. 34735.

HENRY FREYGANG & ALBERT A. TROCON, Partners, Trading as The
Midland Bridge Company,

v.

THE UNITED STATES.

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case; of the findings of fact, conclusion of law and opinion of the court by Graham, J.; of the judgment of the court; of claimants' application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City, this 10th day of July, 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 29,030. Court of Claims. Term No. 480. Henry Freygang and Albert A. Trocon, partners doing business under the firm name of The Midland Bridge Company, appellants, vs. The United States. Filed July 12th, 1922. File No. 29,030.

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